



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 22, 2003

Mr. Robert R. Ray
Assistant City Attorney
City of Longview
P.O. Box 1952
Longview, Texas 75606-1952

OR2003-3448

Dear Mr. Ray:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181401.

The City of Longview (the "city") received a request for any and all information related to complaints filed against city police officers since 2000, and a specified audio tape and any documents related to that audio tape. You state that the requestor subsequently narrowed the first part of his request to include only each complaint and the final resolution of each complaint. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). You also state that the city has released the requested audio tape to the requestor. Finally, you claim that the requested information you have marked is excepted from disclosure under sections 552.101, 552.117, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the information the city submitted to this office for review is not responsive to the instant request for information. Therefore, we will not address the applicability of the Public Information Act (the "Act") in regard to this information.¹ However, we will address the applicability of the Act to the submitted responsive information.

¹Accordingly, we need not address your argument under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code.

Further, we note that the city has not sought an open records decision from this office within the ten business day time period, nor have you provided this office with the required documents within the fifteen business day time period pursuant to section 552.301 of the Government Code. *See* Gov't Code § 552.301. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). The exceptions you claim provide such compelling reasons, and thus, we will address them accordingly.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses confidentiality provisions such as section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

One of the submitted reports, which you have marked, involves juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, this report is confidential pursuant to section 58.007(c) of the Family Code, and it must be withheld from disclosure under section 552.101 of the Government Code.

You also claim that one of the addresses you have marked is confidential under section 772.318 of the Health and Safety Code. In Open Records Decision No. 649 (1996), which interpreted section 772.318 of the Health and Safety Code, we examined several confidentiality provisions in chapter 772 of the Health and Safety Code. To the extent that the submitted information involves an emergency 9-1-1 district established in accordance with chapter 772 of the Health and Safety Code, which authorizes the development of local emergency communications districts, the information may be confidential under chapter 772. Sections 772.118, 772.218, and 772.318 of the Health and Safety Code make confidential the originating telephone numbers and addresses of 9-1-1 callers furnished by a service supplier. *See* Open Records Decision No. 649 (1996). Section 772.118 applies to emergency communication districts for counties with a population over two million. Section 772.218 applies to emergency communication districts for counties with a population over 860,000. Section 772.318 applies to emergency communication districts for counties with a population over 20,000. Subchapter E, which applies to counties with populations over 1.5 million, does not contain a confidentiality provision regarding 9-1-1 telephone numbers and addresses. *See* Health & Safety Code §§ 772.401, *et seq.* Thus, if the emergency communication district here is subject to section 772.118, 772.218, or 772.318, the originating address that you have marked is protected from public disclosure under section 552.101 as information deemed confidential by statute.

Section 552.101 also encompasses the doctrine of common-law privacy. For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Additionally, this office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is protected by common-law privacy, *see* Open Records Decision Nos. 600 (1992), 545 (1990); *see also* Open Records Decision No. 373 (1983) (common-law privacy protects assets and income source information). Having reviewed the submitted information, we have marked the information that is considered highly intimate or embarrassing and is not of legitimate concern to the public. This information is protected by common-law privacy and must be withheld under section 552.101 of the Government Code. However, we conclude that the remaining information you have marked under common-law privacy consists solely of information regarding the employment of the individual in question and, thus, is of legitimate concern to the public. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has

legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Therefore, this information is not protected by common-law privacy, and it may not be withheld under section 552.101 of the Government Code.

We note that a social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers in the responsive information are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the city should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

You also claim that the additional information you have marked is excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(2) excepts the home address and telephone number, social security number, and family member information of a peace officer² regardless of whether the officer made an election under section 552.024 of the Government Code. Therefore, we agree that most of the personal information you have marked must be withheld under section 552.117(2) of the Government Code. However, we note that section 552.117(2) does not encompass an employee's former spouse as family member information. Further, under section 552.023 of the Government Code a person or a person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests. Therefore, the requestor has a special right of access to his section 552.117(2) information pursuant to section 552.023 of the Government Code, and it must be released in this instance. We have marked the information that is not subject to section 552.117(2) and must be released. We have also marked some additional section 552.117(2) information that must be withheld. Finally, you must withhold the submitted audio tapes in their entirety under section 552.117(2) of Government Code.

Additionally, section 552.117(1) excepts the same information regarding current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for

²"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

this information was made. For an employee who timely elected to keep his personal information confidential, you must withhold the employee's home address and telephone number, social security number, and any family member information. The city may not withhold this information under section 552.117(1) for an employee who did not make a timely election to keep the information confidential.

Section 552.119 of the Government Code excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1988). It does not appear that the three exceptions to section 552.119 are applicable in the instant case. Therefore, unless the officer in question has given written consent, you must withhold the submitted photographs we have marked under section 552.119 of the Government Code.

Section 552.130 of the Government Code prohibits the release of information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code* § 552.130. Accordingly, the city must withhold the Texas driver's license and license plate information you have marked pursuant to section 552.130 of the Government Code. We have marked additional information to which section 552.130 is inapplicable and must be released.

Finally, the submitted information contains e-mail addresses of members of the public that may be excepted from disclosure. Section 552.137 of the Government Code makes certain e-mail addresses confidential and provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Accordingly, unless consent to release has been granted, the city must withhold most of the submitted e-mail addresses you have marked under section 552.137 of the Government Code. We have marked the information that is not subject section 552.137 and must be released.

In summary, we conclude that you must withhold the following information under section 552.101 of the Government Code: 1) the report you have marked under section 58.007 of the Family Code; 2) the originating address you have marked if the emergency communication district here is subject to section 772.118, 772.218, or 772.318 of the Health and Safety Code; 3) the information we have marked under common-law privacy; and 4) any social security numbers that are confidential under federal law. Additionally, we conclude that: 5) if a timely election was made or if the information relates to a peace officer, you must withhold the section 552.117 information, including the submitted audio tapes in their entirety; 6) unless written consent was given, you must withhold the submitted photographs we have marked under section 552.119; 7) you must withhold the section 552.130 information; and 8) unless consent to release has been granted, you must withhold the section 552.137 information. All remaining responsive information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 181401

Enc: Submitted documents

c: Mr. Wade Turner
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(w/o enclosures)